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IN THE

Supreme Court of the United States

October Term, 1965.

No. 568

ROBERT J. KIESLING and BETTY LESTER KIESLING,
Petitioners,
v.
THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Robert J. Kiesling and Betty Lester Kiesling petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on June 30, 1965.

OPINIONS BELOW.

The judgment of the United States District Court for the District of New Jersey was entered pursuant to oral opinion (R17a). The opinion of the Court of Appeals is reported in Fed. 2nd (App., infra, p. 1a).

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered June 30, 1965. A timely motion to extend the stay of the mandate of the Court of Appeals to September 15, 1965, was granted by order dated July 16, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

The decree divorcing plaintiff from his former wife required that during her lifetime, so long as she remained unmarried, he was obliged to (and did):

(1) Pay her $2,600 annually, and

(2) Maintain a $25,000 life insurance policy on his life, with the former wife as sole beneficiary in the event of his death.

The questions presented are:

(1) Did the former husband pay and the former wife receive more than $2,600 per annum as alimony (deductible by the husband under §215 and includible in the income of the wife under §71 of the Internal Revenue Code of 1954)?

(2) Was the trial Court correct in determining that in addition to the cash alimony, a portion (69.14%) of the annual premium payment was deductible by the husband and includible in the income of the wife, based on evidence of an age differential of 7 years (husband age 66, wife 59 in 1957) and testimony of an actuary using tables in Internal Revenue Service Publication No. 11?

STATUTES INVOLVED.

Internal Revenue Code of 1954 in §215 and §71 provides:

§215

"* * * there shall be allowed as a deduction amounts includible under §71 of the gross income of the wife * * *," 26 U. S. C. 1958 ed., §215.

§71

"* * * if a wife is divorced from her husband * * * under a decree of divorce * * * the wife's gross income includes periodic alimony payments * * * imposed on * * * the husband under the decree * * *" 26 U. S. C. 1958 ed., §71.

NOTE.

The plaintiff Robert J. Kiesling is referred to as plaintiff or husband although no longer married to Doris Kiesling who is referred to as wife. Betty Lester Kiesling is a party plaintiff solely because she filed joint tax returns with her husband Robert J. Kiesling. For convenience all references herein to plaintiff shall refer to plaintiff, Robert J. Kiesling.

The petitioner has filed with this petition nine copies of the record as printed for use of the court below, which consists of the appendices to the briefs of the respective parties to the appeal to the Third Circuit. References to Appendix annexed to the Government's brief are designated by a capital R followed by a page number and the letter a. References to petitioner's appendix annexed to the Third Circuit brief are designated in the same manner except that the letter b follows the page number.

STATEMENT.

In 1936 the plaintiff and his former wife, Doris A. Kiesling, were divorced and the decree of divorce required that, in addition to certain cash payments, the plaintiff maintains a life insurance policy on his life, of which the said Doris A. Kiesling should be the sole beneficiary in the event of his death, in the sum of $25,000.00, to be maintained during the lifetime of the said Doris A. Kiesling and so long as she shall remain unmarried, the policies evidencing such insurance to be delivered to and remain in the possession of Doris A. Kiesling. ¶8 Finding of Fact R25a.

Pursuant to the above provision of the decree of divorce, the plaintiff provided the policy required. ¶9 Finding of Fact R27a. During each of the calendar years 1957, 1958 and 1959, plaintiff paid an annual premium of $2,133.00. In his income tax returns for each of the years 1959, 1958 and 1959, the plaintiff included the amount of these insurance premiums in his deduction for alimony pursuant to IRC Sec. 215. ¶5 Finding of Fact R24a.

On examination of the returns, that part of the alimony payment representing the payment of life insurance premiums was disallowed as a deduction and suit for a refund of income taxes was instituted in the District Court which had jurisdiction by reason of the provisions of 28 U. S. C. 1958 ed. §1346(a).

At the trial plaintiff Robert J. Kiesling testified that he was born November 23, 1891 and his former wife July 2, 1898 (R5b). He further testified as to his health (R3b) and that his present wife was still living and unmarried, although they were divorced in 1936 when she was 38 years old, and that there was no impediment, physical or religious to her remarriage (R13b-R14b).

Plaintiff's expert witness, Mr. Michael Mundry, an actuary, testified that he made a computation on the value to the wife of the life insurance premiums paid by the husband on the policy (Exhibit P-1, R8a) in which the wife was named sole beneficiary, and that this computation showed the value to the wife to be 69.14% of the annual premium payment. Mr. Mundry testified that his computation was based on the relative probability ". . . that one will predecease the other, and also taking into account her right of remarriage, and the actuarial tables that were used", R10b. These tables he identified as "Table 38 . . . IRS Publication No. 11 . . . and the IRSZRRB remarriage table" (R12b).

Mr. Mundry also testified that these tables were less favorable to the husband because Table 38 makes no distinction between sexes, and females live longer than males; and because of the state of Mr. Kiesling's health, ". . . now considered uninsurable" (R11b).

In awarding judgment to the plaintiff, the trial Court stated:

> "Now, of course, the court well recognizes that this is a contingency, and when you consider the ages of the people, and when you consider the comparative elongation of the life situation of the female since the turn of the century in comparison to the shorter elongation of life in the male, and the fact she is six or seven years his junior at this particular time certainly makes the probability in the matter one that she will survive him barring accident.
>
> "I, therefore, find as a fact that there is a monetary value that went to her during the years 1957, 1958 and 1959 of 69.14 per cent of the premiums on the life insurance policy of $25,000.00 paid in each of those particular years, that she having derived that benefit under the terms of the Internal Revenue law he was

entitled to deduct it as a proper item of deduction from his return, and he is entitled to a credit for whatever those figures will disclose, and, consequently, entitled to recover on his suit which is based upon the claim for refund" (R23a).

The United States of America appealed the District Court's determination to the Third Circuit which reversed the District Court stating, "On this appeal the Government contends that the issue of deductibility of the premium payments turns on the single question as to whether they constituted income to the wife, via the inurement of an ascertainable economic benefit of the policy involved" (App. 18). The Court of Appeals concluded that since the wife's interest in the life insurance policy ". . . is contingent, and not absolute, she has not received any taxable economic benefits so as to make the premiums on such policy, paid by her [former] husband pursuant to the terms of a divorce decree, taxable to her . . ." (App. 20, 21) despite the factual finding by the District Court that the actuarial value to the wife of the life insurance premiums paid by the former husband was 69.14% of the annual premium paid.

REASONS FOR GRANTING WRIT.

1. Importance of the Question. This case presents for decision a question of statutory construction on which the Court of Appeals for the Third Circuit in the instant case and the Second Circuit in the case of *Piel v. Commissioner*, 340 F. 2d 887 (C. A. 2, 1965), held that under §215 of the IRC of 1954 premiums paid on a life insurance policy pursuant to a decree of divorce were not deductible by the

husband where the wife, although the named beneficiary, was not the owner of the policy, because the wife's interest in the policy was contingent, while the Court of Appeals for the Seventh Circuit has determined that the test is ". . . whether petitioner in the taxable years in question received cash . . . or property of ascertainable value. . . ." *Seligmann v. Commissioner,* 207 F. 2d 489 (C. A. 7, 1953), 67 Hav. L. Rev. 1082 (1954). The *Seligmann* case dealt with §22(k) and §23(u) of the 1939 Internal Revenue Code (as amended by the Revenue Act of 1942, §120, 56 Stat. 798, 816), which were incorporated in substantially the same form as §71 and §215 respectively of the 1954 Code.

Where the divorced husband assigns a life insurance policy to his former wife, and she is named the irrevocable beneficiary, the conclusion reached by the courts, *Commissioner v. Hyde,* 301 F. 2d 279 (C. A. 2, 1962), and by the Internal Revenue Service, Rev. Rul. 57-125, 1957-1 Cum. Bul. 27, is that the life insurance premiums paid by the husband are deductible by him under §215 and includible in the wife's income under §71. This conclusion is sound and appears inevitable since the wife owns the policy with every right incident thereto, thereby receiving all the benefit of the premium payments made by the husband.

However, as hereinabove noted, the courts and the Internal Revenue Service have determined that the life insurance premiums paid by the husband are not deductible by him as alimony paid (or includible in the wife's income) unless the policy is assigned to the wife. All of the case law and rulings on this issue arise out of the 1942 amendment to the Internal Revenue Code of 1939. This amendment, §120 of the Revenue Act of 1942, 56 Stat. 798, 816, authorized the deduction by the husband of alimony payments to his former wife and made them includible in her income.

In one of the earliest cases on this issue, the Tax Court

held that the premium payments were deductible by the husband although the wife was not the owner of the policy and her interest was "contingent". *Estate of Boies C. Hart*, 11 T. C. 16 (1948). This trend was reversed by a dictim in *Smith's Estate v. Comm.*, 208 F. 2d 349 (C. A. 3, 1953), in which the Court said:

> "Pursuant to the terms of the contract he says he paid $400 in insurance premiums in the year 1947. There will be no deduction for these for two reasons. One is that it is not shown that he paid the money subsequent to the divorce decree. That, itself, is enough. But in addition, there is an equally strong reason for denying deduction because by the terms of the contract this insurance money went to the wife only if she outlived her husband. The beneficial ownership of the policy was in her subject to this very important contingency. We think this was enough to preclude deduction of payments no matter when made. See Blumenthal v. Commissioner, 3 Cir., 1950, 183 F. 2d 15" (208 F. 2d 349, 353).

The *Blumenthal* case cited in the above quotation was not in point as there the life insurance policy was used solely to secure payment of the alimony provided in the divorce decree.

However, *Weil v. Commissioner*, 240 F. 2d 1389 (C. A. 2, 1957), cert. den. 353 U. S. 958; *Piel v. Commissioner*, 340 F. 2d 887 (C. A. 2, 1965); *Seligmann v. Commissioner*, 207 F. 2d 489 (C. A. 7, 1953), and the decision of the Third Circuit in the instant case squarely present the issue.

Unfortunately, not one of the reported cases, until the instant litigation, gave the courts an opportunity to decide the issue based on proper proofs. No evidence of value is required in a case where the wife has been assigned the

policy, since she receives the benefit of every penny of annual premium paid by the former husband.

However, where, as in this case, the wife is the named beneficiary and has possession of the policy (no change in beneficiary being permitted under the terms of the policy unless it is surrendered), but is not the owner, then the husband, as owner of the policy, has rights in it, e.g., if the former wife pre-deceases him, he then has the sole ownership of the policy. On the other hand, as in this case, if the husband pre-deceases the wife, she receives, unequivocally, the full face amount of the policy.

Clearly, where both the former wife and husband have rights in the life insurance policy, the value derived by the wife from the payment of premiums by the husband, is not the full amount of the premium paid. In this case the value to the wife of the premiums paid by the husband was established by expert testimony of an actuary, using actuarial tables published by the Internal Revenue Service (R12b). However, no such proofs have been offered in any previous reported case on this issue.

Commissioner v. Seligmann, supra, supports this position, although the decision resulted in denying the Commissioner's contention that the full amount of the life insurance premium paid was includible in the wife's income.

In the *Seligmann* case, under the terms of the divorce decree the husband was required to deposit with a trustee life insurance policies, in the face amount of $100,000 and pay the annual premiums thereon. The wife was not the owner or irrevocable beneficiary of the policies. The decree further provided that the trustee be named the beneficiary, and that in the event of the husband's death the proceeds of the policies be retained by the insurance company on the following conditions:

1. The entire income of the principal sum be paid to wife during her lifetime so long as she is not remarried.

2. While she is remarried, the income to be paid in equal parts to the wife and the children of the marriage, or the children's issue per stirpes.

3. On the death of the wife, the principal sum to be paid to the children, or their issue, per stirpes.

4. If while the wife is remarried, no children survive the wife, or in the event that while she is remarried, both children shall be deceased, ⅓ of the income shall be paid to the wife for her life, and the balance as the husband by his will directs; and gifts over to husband's heirs in the absence of any direction.

5. After the wife's death, the principal sum to be paid as husband directs in his will with gifts over in the absence of such directions.

In view of the foregoing, the Court's conclusions that "whatever right she [the former wife] had or acquired was dependent upon so many contingencies that its value could not be measured or ascertained during the taxable year" (207 F. 2d 489, 494) appears reasonable in the absence of any actuarial evidence.

The position of the Second and Third Circuits that the test of the deductibility of the premiums depends on whether or not the husband has assigned the policy to the wife is illogical and unsupportable.

Assume that a husband and wife, through their respective attorneys, are negotiating alimony terms incident to a decree of divorce, under circumstances that may be described as further or worse than at arm's length, and the wife bargains for insurance protection in addition to money. Is the wife who is receiving $2,600 a year plus the payment by the husband of the annual premiums on a life insurance policy, of which she has possession, and is the named beneficiary, receiving nothing more than $2,600 per year? The

Third Circuit's decision in the instant case, and the Second Circuit in the *Weil* and *Piel* cases, supra, say she is not.

The Courts of Appeal for the Second and Third Circuits give as the reason for their decisions the fact that where the wife is not the owner of the policy her interest in the policy is contingent, and therefore has no value.

It is axiomatic that in such cases the wife, although she is not the owner of the policy, does have property rights in it, and that property rights may have value. The Internal Revenue Service has gone so far as to state that "The amount of the fair market value of property is a question of fact, but *only in rare and extraordinary cases will property be considered to have no fair market value.*" Rev. Rul. 58-402, 26 CFR 1.61-1. (Emphasis supplied.)

The rights of the former wife in the policy presents no rare and extraordinary case of contingencies, and was readily valued by an actuarian using Internal Revenue Service publications.

Another fallacy underlying the *rationale* of the *Weil, Piel* and the instant case is the assertion that the wife ". . . received nothing in the tax year in question from the premium payments beyond an aid to her 'peace of mind'. . . ." *Piel v. Commissioner,* 340 F. 2d 887, 891. To the same effect is the decision in the instant case.

Obviously the former wife in this case in having a life insurance policy in which she was the named beneficiary, although not the owner, with the possibility of receiving the full $25,000 face of the policy in any given year, was in an economic sense receiving more than "peace of mind". If the wife did not have the benefit of the husband's providing the policy she would be obliged to pay for such a policy out of her own pocket if she wanted that type of protection.

The fallacy in the Second and Third Circuit opinions is the premise that since the policy in a specific year did not

lead to a payment to the beneficiary she received no economic benefit.

In the *Hyde* case, supra, it is interesting to note that the divorced wife, who in that case was the owner of the policy, argued that there should be included in her income only that amount by which the payment of the annual premiums increased the cash surrender value of the policies. The Court held the entire amount of the premium was includible in the wife's income stating:

> ". . . The right to receive the cash surrender value of policies is only one of the valuable rights which the payment of the premiums bestowed on the petitioner. For example, part of the premium is attributable to petitioner's right to receive the face amount of the policies if her [former] husband dies during the year. . . ." (301 F. 2d 279, 283).

Thus the Second Circuit, prior to the *Piel* case, supra, recognized that the right to receive the face of the policy during a given year was a valuable present right, and not mere "peace of mind".

2. Inconsistency of the Position of the Internal Revenue Service. The position of the Internal Revenue Service in denying the deductibility on the theory that the wife's contingent interest in the policy renders such payments valueless to her is completely inconsistent with its published rulings and regulations. For example:

a. Income Tax Regulations §25.2515-2(b)(2) requires that the value of a gift of a property right contingent on survivorship is taxable, as for example, where a husband pays the entire consideration for a home which is conveyed to the husband and wife as tenants by the entireties. The calculation of the value of the gift is illustrated in the fol-

lowing example in Income Tax Regulations, §25.2515-2 (b)(2):

> "A husband with his own funds acquires real property valued at $10,000 and has it conveyed to himself and his wife as tenants by the entirety. Under the law of the jurisdiction governing the rights of the parties, each spouse is entitled to share in the income from the property but neither spouse acting alone could bring about a severance of his or her interest. The husband elects to treat the transfer as a gift in the year in which effected. At the time of transfer, the ages of the husband and wife are 45 and 40 respectively, on their birthdays nearest to the date of transfer. The value of the gift to the wife is $5,502.90, computed as follows:
>
> | | |
> |---|---|
> | Value of property transferred ..... | $10,000.00 |
> | Less $10,000 x 0.44971 (factor for value of donor's retained rights) ..... | 4,497.10 |
> | Value of gift ..... | $ 5,502.90." |

b. In Rev. Rul. 64-328, 1964, 2 Cum. Bul. 11, the Internal Revenue Service announced that an employee entering into a "split dollar" arrangement with his employer for the payment of life insurance premiums would be required to include in his (the employee's) income the value of the insurance protection. This Ruling refers to one of the two major types of "split dollar" arrangements as the "endorsement system" and describes it as one in which ". . . the employer owns the policy and is responsible for the payment of the annual premiums" (1964, 2 Cum. Bul. 11, 12).

It may be here noted that in this case the divorced husband owns the policy and is responsible for the payment of the annual premiums but the divorced wife is the named beneficiary.

In the case of the "split dollar" plan, the Internal Revenue Service concludes that the arrangement results in an economic benefit to the employee which is includible in his taxable income because, "It is well settled that the providing of life insurance results in an economic benefit" (1964, 2 Cum. Bul. 11, 13).

The Internal Revenue Service reached this conclusion with respect to "split dollar" insurance, after reversing its former position announced in Rev. Rul. 55-713, 1955, 2 Cum. Bul. 23, in which it had ruled that the arrangement did not result in taxable income to the employee.

In the light of the position of the Internal Revenue Service that the former wife in this case received no ascertainable economic benefit from the payment of the life insurance premiums by her former husband, it is interesting to note the reasons given by the Internal Revenue Service for its change of position on "split dollar" insurance plans. Rev. Rul. 64-328 cites, not only Senate Report No. 830 to the effect that a substantial economic benefit is received from having life insurance protection provided, but also advises that in calculating the amount of economic benefit received taxpayers should use the tables in IRS Publication No. 11. These are the same tables used by plaintiff's actuary in calculating the value to the wife of the life insurance premiums paid by the husband in this case (R11b).

c. U. S. Senate Finance Committee Report No. 830 points out the inconsistency of the Internal Revenue Service with respect to the inclusion in employees' income of life insurance premiums paid by others. The Report states:

> "4. Group term life insurance purchased for employees (sec. 204 of the bill and sec. 79 of the code).
>
> (a) Present law.—Under present law, employees are required to include in their income the amount of premiums paid by their employers to provide them with

individual life insurance or group permanent life insurance which carries a loan or surrender value. However, the regulations 1.61-2(d)(2) have provided that the cost of group term life insurance purchased for employees is not includible in their income as compensation although the employer receives deductions for the amounts he pays to provide this protection.

(b) General reasons for provisions.—As indicated above, this tax-free status for employer-financed group term life insurance is inconsistent with the tax treatment of other types of life insurance protection furnished employees by their employers. While this complete exclusion might have been considered relatively insignificant when tax rates were low, the present relatively high rates as well as the growing volume of group term life insurance now provided makes it particularly inequitable to continue this complete exclusion. *The employee in such case receives a substantial economic benefit from this insurance protection whether or not the policy for a specific year leads to a payment to his beneficiary. The provision of this insurance by the employer relieves the employee of substantial costs of providing his own insurance protection for his family which he would otherwise have to provide out of tax-paid dollars."* (Italics supplied.) Senate Finance Committee Report No. 830, 88th Congress 2d Session, pp. 45-46; 1964, 1 Cum. Bul. (Part 2) 549-550.

CONCLUSION.

A divorced husband, who pursuant to a decree of divorce, annually pays his wife $2600 together with the premium on a $25,000 life insurance policy which he owns although the policy itself is in the wife's possession, and in which she is the named beneficiary, is entitled to deduct, under §215 of IRC 1954, as alimony paid, the $2600 plus the value to the wife of the annual life insurance premiums paid by the husband. This value is definite and ascertainable when established by competent actuarial testimony.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15002.

ROBERT J. KIESLING and
BETTY LESTER KIESLING
v.
UNITED STATES OF AMERICA and WILLIAM F. CULLINEY, DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE at Camden, New Jersey,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued February 15, 1965.

Before: KALODNER and SMITH, Circuit Judges, and KIRKPATRICK, District Judge.

OPINION OF THE COURT.

(Filed June 30, 1965.)

By KALODNER, Circuit Judge.

Were life insurance premiums here paid by the taxpayer[1] under the provisions of a divorce decree deductible under Section 215 of the Internal Revenue Code of 1954?[2]

The District Court held[3] that the taxpayer was entitled to deduct 69.14 per cent of the premiums[4] on its view that the taxpayer was under a "legal obligation" to pay the premiums, and his wife's "interest" in the policy was "absolute" and "vested".

On this appeal the Government contends that the issue of deductibility of the premium payments turns on the single question as to whether they constituted income to the wife, via the inurement of an ascertainable economic benefit under the policy involved.

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[1] The taxpayer's present wife, Betty Lester Kiesling, is a party to this action because there was a joint income tax filed. For convenience, the terms husband and wife used in this opinion relate to the taxpayer and his divorced wife, Doris A. Kiesling.

[2] 26 U. S. C. A., §215.

[3] The opinion of the District Court is not reported.

[4] The District Court's premise for the partial deduction is set forth in paragraph 11 of its "Findings of Fact" as follows: "Taking into account the respective ages of Robert J. Kiesling and Doris A. Kiesling, and that the interest of Doris A. Kiesling in the policy of insurance terminates in the event of her death or remarriage prior to the death of Robert J. Kiesling, the actuarial value of the economic benefit to her of the annual life insurance premiums paid in each of the years 1957, 1958 and 1959 is 69.14% of such premium; since such premium in each year was $2,133.00, said economic benefit is 69.14% thereof, or $1,474.76."

The undisputed facts, critical to our disposition, are as follows:

The taxpayer divorced his wife on July 29, 1936. The divorce decree provided he was to pay her $2600.00 a year during her lifetime or until she remarried and to make provision in his will for similar payments in the event that he predeceased her at a time when she was unmarried.[5]

The divorce decree contained this further provision:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that during the lifetime of the defendant he shall keep and continuously maintain good and sufficient life insurance upon his life, of which the plaintiff shall be sole beneficiary in the event of his death, in the sum of Twenty-five Thousand ($25,000.00) Dollars, same to be in the form of term or continuing policy insurance, and to be maintained during the lifetime of the plaintiff, and so long as she shall remain unmarried, the policies evidencing such insurance to be delivered to and to remain in the possession of the plaintiff; . . ."

Pursuant to this provision, the taxpayer obtained a life insurance policy which he delivered to his wife. It has remained in her possession. The policy reserved to the taxpayer the right to change his beneficiary, and inter alia, the right to assign it; to borrow on it, etc. It specifically provided that the wife, as revocable beneficiary, obtained ". . . no vested interest hereunder, and the Insured may exercise every right, receive every benefit and enjoy every privilege conferred by this policy. . . ."

The Commissioner disallowed the taxpayer's claimed de-

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[5] The payments were to be made in semi-monthly installments during taxpayer's lifetime and in monthly installments following his decease.

ductions for the premiums paid on the policy during the years 1957 to 1959, inclusive. The taxpayer then paid the assessed deficiency and brought the instant action for refund in the District Court.

Pertinent here are these provisions of the Internal Revenue Code of 1954:

> "Section 71(a)(1):
>
> "Decree of divorce or separate maintenance.—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation."
>
> * * * * * * * *
>
> "Section 215(a):
>
> "General Rule.—In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. . . ."

The sum of the foregoing provisions is that under Section 71(a)(1) the wife's gross income includes periodic payments received from her husband in discharge of his legal obligation as specified in a decree of divorce, and under Section 215(a) a husband is allowed to deduct such payments.

It is settled that where a wife's interest as beneficiary in a life insurance policy obtained by her husband is contingent, and not absolute, she has not received any taxable economic benefits so as to make the premiums on such pol-

icy, paid by her husband pursuant to the terms of a divorce decree, taxable to her, and as a corollary, non-deductible to her husband.

In the instant case the contingent nature of the wife's interest in the policy is demonstrated by these factors: her interest in the policy ceased upon her death or remarriage during the taxpayer's lifetime; her designation as beneficiary was revocable; the policy had not been assigned to her and she had no right to assign it, or to obtain its cash surrender value or to borrow on it; under the policy's specific provisions she obtained "no vested interest" in it; and the taxpayer retained the right to "exercise every right, receive every benefit and enjoy every privilege conferred by this policy."

In Smith's Estate v. Commissioner, 208 F. 2d 349, 353 (1953), we held that premiums paid by a husband under a divorce decree on his life insurance policy were not deductible by him "because by the terms of the contract [policy] this insurance money went to the wife only if she outlived her husband. The beneficial ownership of the policy was in her subject to this very important contingency."

Seligmann v. Commissioner, 207 F. 2d 489 (7 Cir. 1953), a leading case, is to the same effect. It was there held that life insurance premiums paid by the taxpayer's husband under a separation agreement were not taxable to her because she had to survive her husband in order to benefit from the proceeds of the policies, and even then the amount of the benefits would depend upon whether or not she was remarried.[6]

In discussing the tax consequences of the husband's payment of the life insurance premiums the Court said in part at page 494:

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[6] There the separation agreement provided that in the event of the wife's remarriage her benefits under the policy would be reduced.

". . . we are unable to discern how it can be thought that petitioner [wife] realized a taxable economic gain during the years in question. Certainly, as noted, she received no cash, either actually or constructively, and it would appear equally certain that she received no property capable of measurement or ascertainment. The most that can be said is that the right which she acquired at the time the separation agreement was executed was preserved to her from year to year, including those here involved, by the husband's payment of the premiums on his life insurance policies which he was obligated to make. After the payments were made she had no different or greater right than she had before. In any event, whatever right she had or acquired was dependent upon so many contingencies that its value could not be measured or ascertained during the taxable year. And it was a matter of rank speculation or conjecture as to whether petitioner would ever realize any economic gain. The only benefit which we are able to discern accruing to petitioner during the taxable years was an aid to her peace of mind, which could be expected to result from knowledge that at some unforeseeable time in the future she might . . . benefit from the proceeds of the insurance policies. Under the terms of the agreement she never could receive one cent unless she lived longer than her husband, and even then the amount of or the extent of the benefit would depend upon whether she was remarried. *Mere peace of mind or the satisfaction which stems from knowledge that protection may be of benefit in the future does not constitute taxable economic gain.*" (Emphasis supplied.)

In Weil v. Commissioner, 240 F. 2d 584 (2 Cir. 1957), cert. den. 353 U. S. 958, the husband, under a separation

agreement, became obligated to pay the premiums on certain life insurance polices of which his wife was the prime beneficiary. As here, her interest in the policies ceased upon her death or remarriage during her husband's lifetime; she had no right to change the beneficiary, to assign the policies, or to obtain their cash surrender values. Also, as here, the policies were delivered to her. There was the further circumstance, absent here, that the husband contracted "that he will not assign, transfer or encumber said policies . . . and that he will not surrender or in any other manner change the benefits or terms of said policies during the lifetime of the Wife or until her remarriage, without her written consent." The policies, incidentally, provided that an assignment was to be in writing in order to be binding.

On the facts stated the Court held that the husband could not deduct the premiums because he had not assigned the policies to his wife. In doing so it said at page 587:

> "While certain restrictions were placed upon the husband's control of the policies, *he clearly retained ownership*. The Tax Court was correct in refusing to treat the premium payments as constructively received by his wife." (Emphasis supplied.)

In Hyde v. Commissioner, 301 F. 2d 279 (2 Cir. 1962), it was held that the divorced wife was required to include in her income the premiums paid by her former husband, under a separation agreement, on his life insurance policies which he had assigned to her, in which she was the named beneficiary "without limitation or reservation".

The Court premised its holding on the circumstances that the husband has *assigned* the policies to his wife and "not retained any interest" in them (p. 282), and that she "is indefeasibly vested and she possesses all the rights" under the policies (p. 283).

In Piel v. Commissioner, 340 F. 2d 887 (1965), the Second Circuit recently refused to reconsider its prior rulings in *Weil* and *Hyde*, stating at page 890:

> ". . . it is apparent that the weight of recent authority has equated benefits with ownership and has refused to allow a deduction where the beneficiary has failed to obtain non-contingent substantial proprietary rights in the proceeds of the policies and thus in the benefits generated by the premium payments.
>
> "In effect, petitioners ask that the weight of authority, including Weil and Hyde, be distinguished or reconsidered by this court, and that we reverse the decision of the Tax Court. But after careful consideration . . . we affirm the decision of the Tax Court and adhere to the position that ownership of the policies is necessary to support a deduction."

Since in the instant case the taxpayer retained ownership of his life insurance policy, and, as stated in detail, his wife's interest as beneficiary was contingent, and not absolute, the premiums paid were not deductible under Section 215.

For the reasons stated the Judgment of the District Court will be reversed and the cause remanded with directions to proceed in accordance with this Opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 568

ROBERT J. KIESLING AND BETTY LESTER KIESLING,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Robert J. Kiesling, the petitioner, divorced his wife in 1936. The decree provided, *inter alia,* that during his life the husband [1] was to maintain a term life insurance policy of $25,000 on his life with his wife as the sole beneficiary so long as she lived unmarried. Pursuant to that decree the husband obtained and delivered a life insurance policy to his wife. (R. 25a–27a.) [2] Under the terms of the policy, the

[1] For convenience, the terms husband and wife are used throughout this memorandum although the parties are no longer married.

[2] "R." references are to the portions of the record below printed in the Brief and Appendix for the Appellant.

husband reserved the right to change the beneficiary (R. 8a) and the wife, as revocable beneficiary, obtained "* * * no vested interest hereunder, and the Insured may exercise every right, receive every benefit and enjoy every privilege conferred by this policy * * *" (R. 12a).

The question presented is whether the husband may deduct premiums he paid on that policy from 1957 through 1959. The district court held that the husband was entitled to deduct 69.14 percent of the premiums he paid (R. 28a), and the court of appeals reversed (Pet. 24).

Alimony payments (including life insurance premiums) may be deducted by the husband only if they are "includible under section 71 in the gross income of his wife." Internal Revenue Code of 1954, § 215. Her gross income, in turn, includes periodic payments "received" from her husband in discharge of a legal obligation imposed by a divorce decree. Internal Revenue Code of 1954, § 71. Thus the question is whether the husband or the wife will be taxed on the amount of the insurance premiums. The Commissioner and the courts of appeals have consistently taxed the wife (and thus given a deduction to the husband) only where the wife's interest as beneficiary is absolute and not contingent. Rev. Rul. 57–125, 1957–1 Cum. Bull. 27; I.T. 4001, 1950–1 Cum. Bull. 27; *Piel* v. *Commissioner*, 340 F. 2d 887 (C.A. 2); *Smith's Estate*

v. *Commissioner*, 208 F. 2d 349 (C.A. 3); *Seligmann* v. *Commissioner*, 207 F. 2d 489 (C.A. 7).[3]

Here, the interest of the wife was subject to many contingencies. As the court of appeals noted (Pet. 21):

> * * * her interest in the policy ceased upon her death or remarriage during the taxpayer's lifetime; her designation as beneficiary was revocable; the policy had not been assigned to her and she had no right to assign it, or to obtain its cash surrender value or to borrow on it; under the policy's specific provisions she obtained "no vested interest" in it; and the taxpayer retained the right to "exercise every right, receive every benefit and enjoy every privilege conferred by this policy."

Since in these circumstances the courts have uniformly concluded that it would be unfair to tax the wife on the premiums paid by her former husband, the payments are not deductible by the husband under Section 215.

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[3] The petitioner points to a regulation, a revenue ruling and an extract from a Senate Finance Committee Report all of which concern other sections of the Code and claims that they are inconsistent with the position of the Government in this case. (Pet. 12–15.) Not one of those examples, however, would require the beneficiary of a life insurance policy whose interest was subject to extensive contingencies to include the premiums in income.

The decision by the court of appeals is correct. There is no conflict of appellate court decisions and no occasion for review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1965.

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